

**BPH RN 19-01: READOPTION OF EMERGENCY REGULATIONS
FINDING OF EMERGENCY**

(Original Emergency Rulemaking: OAL File No. 2018-1012-03E)

**BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES**

The Board of Parole Hearings (Board) seeks to readopt the emergency regulations concerning advancing inmates' parole consideration hearing dates filed with the Office of Administrative Law (OAL) on October 12, 2018 (OAL File No. 2018-1012-03E), which became effective on October 22, 2019, and expire on April 23, 2019. The continued implementation of these emergency regulations is necessary for the preservation of the public peace, health, safety, or general welfare, within the meaning of Government Code section 11346.1.

The Board incorporates by reference the Finding of Emergency Statement¹ submitted in its original emergency regulatory filing.

Continued Emergency and Necessity for Readoption of Emergency Regulations

The original adoption of these emergency regulations was necessary to uphold the validity of the Victim's Bill of Rights Act, also known as Marsy's Law. The courts in *Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007 and *In re Vicks* (2013) 56 Cal.4th 274 found no ex post facto violations in the increased parole hearing denial lengths specifically because of the Board's discretionary authority to advance hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1). Additionally, the courts clarified their expectation for the Board to implement a meaningful mechanism to exercise this discretion to advance hearings. The Board subsequently exercised its discretion under section 3041.5, subdivision (b)(4) to conduct a structured administrative review process to determine whether, in accordance with statutory requirements, new information or a change in circumstances established a reasonable likelihood that consideration of public safety does not require the additional period of incarceration.

In response to litigation challenging the Board's ability to advance parole hearings, based mainly on the lack of regulations formally memorializing these processes, the Board filed emergency regulations to continue advancing and holding parole hearings for inmates most likely to be found suitable before their originally scheduled hearing date. The Board also provided data in its original Finding of Emergency Statement spanning from January 1, 2014, to August 31, 2018, showing that the PTA and administrative review processes are meaningful, effective mechanisms mitigating the risk of prolonged incarceration for inmates. From September 1, 2018, to March 1, 2019, deputy commissioners reviewed and advanced 167 parole consideration hearings based on

¹ A copy of the original Finding of Emergency Statement is included with this filing.

PTAs. During the same time period, deputy commissioners advanced 382 parole consideration hearings under the administrative review processes.²

This new data shows that the emergency circumstances prompting the Board's initial adoption of the emergency regulations remain unchanged. Moreover, in the absence of regulations for the hearing advancement process, the Board remains vulnerable to the same litigation that prompted the original emergency filing. Thus, it is imperative for the Board to readopt the emergency regulations and continue implementing its parole hearing date advancement processes without interruption to remain in compliance with the court decisions upholding the validity of Marsy's Law.

Showing of Substantial Progress in Compliance with Government Code Section 11346.1(e)

Upon filing its emergency regulations to adopt California Code of Regulations, title 15, sections 2150-2157, the Board began developing regulations and working with various stakeholders for input on the regulatory text. The Board incorporated these changes, and on March 18, 2019, a majority of the total membership of the Board voted to approve the amendments to the emergency regulations as reflected in this readoption filing. The Board intends to file its regular rulemaking before the expiration of the original emergency regulations on April 23, 2019. However, to fully comply with all the requirements for a regular rulemaking as outlined in Government Code section 11346.1, subdivision (e), a readoption of the emergency regulations is necessary to keep them in effect during the regular rulemaking process.

² Additional data regarding the grant rates for cases advanced from September 1, 2018, to March 1, 2019, are not currently available as many of the cases have been scheduled for a hearing but have not yet resulted in a grant or denial of parole.

BPH RN 18-01: ORIGINAL FINDING OF EMERGENCY¹

(OAL File No. 2018-1012-03E)

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS TITLE 15. CRIME PREVENTION AND CORRECTIONS DIVISION 2. BOARD OF PAROLE HEARINGS CHAPTER 2.5. ADVANCING PAROLE CONSIDERATION HEARING DATES

Background

Section 3041.5 of the Penal Code previously required the Board of Parole Hearings to conduct annual parole consideration hearings, which could be deferred under certain circumstances for up to five years for murderers and up to two years for non-murderers. In 2008, the People of California passed the California Victim's Bill of Rights Act (also known as "Marsy's Law"), which amended Penal Code section 3041.5 and increased denial periods to a minimum of three years and a maximum of 15 years. Therefore, the shortest denial length an inmate can receive after Marsy's Law has increased from one to three years. Additionally, the presumption has shifted from the shortest denial period to the longest denial period of 15 years unless the Board finds by clear and convincing evidence that longer denial periods are not needed.

Following these changes, inmates potentially faced longer periods of incarceration after a denial of parole by the Board, which raised the question of whether the amendments prolonged an inmate's incarceration in violation of ex post facto laws. However, section 3041.5, subdivisions (b)(4) and (d)(1) also gave the Board discretion to advance an inmate's parole consideration hearing to an earlier date under its own authority or based upon a written request by an inmate (also known as a Petition to Advance or "PTA").

In 2011, the Ninth Circuit Court of Appeals in *Gilman v. Schwarzenegger* (9th Cir. 2011) 638 F.3d 1101 (*Gilman I*), held that the 2008 initiative responsible for these changes did not violate ex post facto laws on its face because it did not create a significant risk of prolonging an inmate's incarceration. The court specifically pointed to the Board's discretionary authority to advance hearings under Penal Code section 3041.5, subdivision (b)(4) and the inmate's right to submit a PTA under subdivision (d)(1), and found that the availability of advanced hearings removed any possibility of harm to the inmate. (*Id.* at p. 1109.) The court further noted that, absent evidence to the contrary, it "must presume that the Board will, upon request, schedule [advanced] hearings for prisoners who become suitable for parole prior to their scheduled hearings." (*Ibid.*) The same court in February 2016 held that no ex post facto violation had occurred as applied to the plaintiff class because there was insufficient evidence "demonstrating that the PTA process failed to afford relief from the classwide risk of lengthened incarceration posed by [Marsy's Law]." (*Gilman v. Brown* (9th Cir. 2016) 814 F.3d 1007, 1021 (*Gilman II*)).

¹ This is the original Finding of Emergency Statement submitted by the Board for the emergency regulations (OAL File No. 2018-1012-03E), which became effective on October 22, 2018, and expire on April 23, 2019.

The California Supreme Court in *In re Vicks* (2013) 56 Cal.4th 274, also considered the issue of whether these statutory changes violated ex post facto laws and created a significant risk of prolonging an inmate's incarceration. The Court concluded that Marsy's Law did not violate ex post facto laws and did not create a significant risk of prolonging an inmate's incarceration due to the Board's discretionary authority to advance hearings under Penal Code section 3041.5 subdivision (b)(4), and an inmate's ability to submit a written request for an advanced hearing under subdivision (d)(1). (*Id.* at pp. 304-305, 317.)

These state and federal cases ultimately upheld Marsy's Law under the expectation that the Board could and would exercise its discretion "at a point in time when it might have exercised its discretion under the prior scheme." (*In re Vicks, supra*, 56 Cal.4th at p. 301.) The *Vicks* court specifically referenced as a basis for its decision the Board's unfettered discretion to advance a hearing "any time new information or a change in circumstances indicates that there is a reasonable likelihood the prisoner is suitable for parole." (*Id.* at p. 305.) Embedded in this is the Board's "authority to direct its staff to review a particular prisoner's circumstances at any time to determine if there is a reasonable likelihood the prisoner is suitable for parole." (*Id.* at p. 302.)

Following the *Gilman* and *Vicks* decisions, the Board exercised its discretion under section 3041.5, subdivision (b)(4) to conduct a structured administrative review process whereby deputy commissioners review cases to determine whether, in accordance with statutory requirements, new information or a change in circumstances established a reasonable likelihood that an inmate is suitable for parole. This administrative review process was publicly presented to the Board's commissioners at the July 15, 2013 and August 9, 2013 Executive Board Meetings. Since then, deputy commissioners have reviewed cases and advanced the hearings of those inmates meeting the statutory requirements.

On August 2, 2018, an Orange County Superior Court issued a temporary injunction enjoining the Board from conducting an inmate's parole consideration hearing that was advanced under the Board's administrative review process. (*Tony Rackauckas, et al. v. State of California, et al.*, Orange County Superior Court, Case No. 30-2018-00985610-CU-WM-CJC.) The court found that the Board had not formally adopted a policy assigning to deputy commissioners the responsibility of advancing hearings or establishing criteria to guide the deputy commissioners in making those decisions. (*Id.* at p. 9.) The court issued a final preliminary injunction on August 24, 2018. (*Id.*)

On August 20, 2018, a majority of the total membership of the Board voted to assign deputy commissioners the responsibility to make decisions to advance a hearing date under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1) and to ratify all previous decisions made by a deputy commissioner to advance a hearing under those subdivisions. On September 17, 2018, the majority also voted to approve the Board's current PTA and administrative review process as reflected in the text of these emergency regulations.

Justification of Emergency

Government Code section 11342.545 defines emergency as “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.” Recent litigation, including the Orange County Superior Court’s Injunction, jeopardizes the Board’s ability to comply with *Vicks* by halting the administrative review process. The Board views this as an emergency that disrupts the public’s general welfare and the peace, health, and safety of victims.

I. The Board Must Continue Its Advanced Hearing Processes to Comply with Court Decisions and to Preserve Marsy’s Law

The People of California voted by initiative to enact statutory changes that instituted longer periods of incarceration between parole hearings. Marsy’s Law withstood arguments of facial and as-applied ex post facto violations because both the *Gilman* and *Vicks* courts found that the Board’s discretionary authority to advance hearings under Penal Code section 3041.5, subdivisions (b)(4) and (d)(1) served as a sufficient and meaningful mechanism to ensure that Marsy’s Law did not unlawfully prolong inmates’ incarceration. In other words, without these processes to advance hearings when statutorily appropriate, Marsy’s Law would almost certainly not have withstood the constitutional challenges under ex post facto laws.

In efforts to comply with the court decisions, from January 2014 through August 2018, deputy commissioners reviewed and advanced 1,885 parole consideration hearings based on PTAs. As of September 27, 2018, 1,623 of those hearings had been scheduled, resulting in 421 grants of parole (25.9% grant rate). During that same time period, deputy commissioners advanced 4,679 parole consideration hearings under the administrative review process. As of September 27, 2018, 3,311 of those hearings had been scheduled, resulting in 1,171 grants of parole (35.3% grant rate). The general grant rate for all hearings scheduled by the Board between January 1, 2014, and August 31, 2018, is 17.76%. As seen from the data, the grant rate for inmates whose hearings are advanced through either the PTA or the administrative review processes is significantly higher relative to that of all hearings. In other words, many of the inmates whose hearings are advanced are found to be suitable for parole earlier than the denial length they were given at their last hearing.

This data confirms that the Board’s PTA and administrative review processes are meaningful mechanisms that mitigate the risk of prolonged incarceration for inmates, thereby protecting their constitutional rights. Because these processes are the foundation of the *Gilman* and *Vicks* courts’ decisions to uphold the validity of Marsy’s Law, it is imperative that the Board continue its advanced hearing processes without interruption to remain in compliance with the court decisions.

II. Recent Litigation Challenges the Board’s Administrative Review Process and Significantly Impacts the Board’s Ability to Comply with Court Decisions and to Preserve Marsy’s Law

Recent litigation creates an urgent need for the Board to adopt emergency regulations that reflect its longstanding processes to advance hearings in the appropriate circumstances so that it can continue to comply with the court decisions and to protect Marsy’s Law. Without immediate

action, the Board may be increasingly subject to similar litigation that will have a greater impact on both the constitutional rights of inmates and the rights of victims under Marsy's Law.

The Orange County Superior Court's injunction recently halted the Board from advancing an inmate's parole hearing because, under Penal Code section 5076.1, subdivision (b), a majority of "the board" (i.e., commissioners) did not vote to explicitly assign the role of advancing hearings and the procedures associated with it to deputy commissioners. The Board maintains the position that deputy commissioners were properly authorized to make determinations about whether an inmate's hearing should be advanced under these processes. However, it is appropriate to memorialize the existing procedures to address the issues raised by the court and avoid uncertainty regarding the validity of a hearing panel's decision rendered as a result of a deputy commissioner having advanced a hearing under the PTA or administrative review process. Currently, the Board has 267 pending hearings based on PTAs and 475 pending hearings based on administrative reviews. Failure to hold these hearings would impact a significant number of inmates. Therefore, immediate action is warranted.

In light of the recent litigation drawing the Board's attention to the immediate need to regulate its PTA and administrative review processes for advancing hearings, the Board seeks to use the emergency regulatory process to allow the Board to continue its advanced hearing processes to comply with *Vicks* and *Gilman* and preserve the peace, health, and safety of victims, as well as the public general welfare, while it prepares regulations for the regular rulemaking process.

Statement of Necessity

As explained above in greater detail, these regulations are necessary to allow the board to continue to preserve the will of the California voters in enacting Marsy's Law by exercising discretion to advance hearing dates when appropriate, as contemplated by the Ninth Circuit and California Supreme Court.

In section 2150, the regulations allow an inmate or the inmate's attorney of record to file a subsequent written petition once every three years from the date of the board's previous review on the merits issued under section 2156. This provision is necessary to clarify the statutory three-year limitation in Penal Code section 3041.5, subdivision (d)(3), which states that "An inmate may make only one written request as provided in paragraph (1) during each three-year period" and that, following a summary denial of a request or a decision to deny parole, "the inmate shall not be entitled to submit another request for a hearing . . . until a three-year period of time has elapsed from the summary denial or decision of the board." Specifically, the board needed to clarify that the three year period specifically ran from the date of the prior decision on the merits following review of an inmate's previous petition to advance a hearing date.

In section 2153, these regulations require the board to initiate an administrative review for any inmate whose most recent parole consideration hearing resulted in a denial of three years. This review must be initiated 11 months after the date of the parole consideration hearing that resulted in the three-year denial. While the California Supreme Court in *Vicks* found that the board's discretion to review an inmate's case for possible advancement of his or her next hearing date was "unfettered" (*In re Vicks* (2013) 56 Cal.4th 274, 300), the concurring opinion in the *Vicks*

court expressed concern that, while the board clearly had authority to advance hearings, there was no evidence presented about the extent to which the board was exercising the discretion to review cases for advancement. Additionally, the *Vicks* court grappled with whether the increase in minimum denial length from one to three years “deprived [the inmate] of an earlier release date” balanced by the concern that “[m]ost of the circumstances relevant to suitability for parole in California are not of a type amenable to rapid change.” (*Vicks*, 56 Cal.4th at 303.) Therefore, in developing a more structured approach to exercising its discretion in a manner that would meaningfully uphold the intent of the California voters in enacting Marsy’s Law, the board finds it necessary to review those inmates who are the most likely to have received annual hearings under prior law, but to allow sufficient time to pass such that a change in circumstances or new information is more likely. The board found that advancing a three-year denial to approximately 18 months, when a change in circumstances or new information reasonably demonstrated the additional remaining time was not necessary, represented the best balance between the *Vicks* court’s two concerns.

Since the preliminary screening, victim notification, and review on the merits processes require approximately two calendar months to complete, and scheduling requires approximately an additional five months to place an inmate on the next available hearing calendar (accounting for all required notification periods preceding a parole consideration hearing), the board subtracted seven months from 18 and determined that it was necessary to initiate the administrative review process 11 months after the date of a three-year denial so that, if the inmate is deemed appropriate for hearing advancement, the board has created a meaningful mechanism to advance the inmate’s hearing to 18 months. This timeframe was necessary to balance the need to advance the hearings for those inmates most likely to be found suitable so that they are not “deprived of an earlier release date,” but still providing sufficient time between the prior and next hearing to allow for a true change in circumstances or new information to occur.

In Section 2153, the regulations also exempt from the administrative review of three-year denial processes those determinately sentenced inmates who, on the date of hearing, were within 24 months of their Earliest Possible Release Date (EPRD) by operation of determinate sentencing law. As previously explained, the review and scheduling process takes a total of approximately seven months to complete. Additionally, once a determinately sentenced inmate is granted parole at a parole consideration hearing, the decision granting parole is subject to the board’s decision review process under Penal Code section 3041(b)(2) and the Governor’s decision review process under Penal Code section 3041.1. The decision granting parole does not become final until 120 days have passed, after which the Governor has 30 days to review the decision. Thus, for an inmate who, on the date of the prior hearing resulting in the three-year denial, was already within 24 months of his or her EPRD, the advancement process would be meaningless as the inmate would likely already be released by operation of law before the decision granting parole would be finalized and the inmate could be released.

Finally, in section 2154, subdivision (b), the board established screening criteria that would exclude an inmate from the administrative review of the three-year denial process. The board determined it was necessary to establish screening criteria to avoid wasting resources reviewing inmates who were unlikely to demonstrate a change in circumstances or new information demonstrating a reasonable likelihood that consideration of the public and the victim’s safety

does not require that the inmate remain incarcerated until the date of his or her next parole consideration hearing. Thus, each of the exclusionary criteria established in subdivision (b) represents a factor that, alone, demonstrates the inmate is unlikely to meet that standard.

Specifically, paragraph (b)(1) excludes inmates who admitted to the board in their previous hearing that they will not be suitable for parole for at least three or more years. Paragraph (b)(2) excludes inmate whose prior hearings resulted in denial lengths of longer than three years, since these inmates were already deemed to require substantially more than the minimum period of time to attain suitability. Paragraph (b)(3) excludes inmates who were rated to present a "high" risk of engaging in future violence on the most recent comprehensive risk assessment conducted in accordance with section 2240 of the board's regulations because this inmates have been assessed by a psychologist to represent the highest level of risk for violent recidivism that can be assessed to inmates serving long-term sentences. Paragraph (b)(4) excludes inmates who, within 11 months of their prior hearing resulting in the three-year denial, submitted a petition to advance that the board reviewed on the merits because it is unlikely that the board would reach a different decision just a few months later. Paragraphs (b)(5) and (b)(6) exclude inmates who, since the date of their prior hearing resulting in the three-year denial, committed a rules violation other than a minor Division F infraction or were convicted of a new crime because the fact that the inmate is continuing to violate institution rules or laws demonstrates that he or she is unlikely to be able to show that the remaining denial period is not required. Paragraph (b)(7) excludes inmates whose next hearing date was already advanced since the board has already exercised discretion to advance this hearing.

Each of these screening exclusions is necessary to allow the board to focus its resources in exercising the discretion to review inmates for advancement on those inmates most likely to be found suitable for parole. However, it is important to note that all of the inmates excluded from the board's administrative review of a three-year denial process are still entitled to petition the board to advance their hearing under the Petition to Advance process in section 2150.